

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

ISSUES

The Assistant Director awarded claimant benefits for a 100 percent permanent partial general disability. The respondent and its insurance carrier requested the Appeals Board to review the issue of nature and extent of disability. That is the only issue before the Appeals Board on this review.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

The Award entered by the Assistant Director should be modified to reduce claimant's permanent partial general disability from 100 percent to 50 percent.

The parties stipulated that claimant sustained personal injury by accident arising out of and in the course of his employment with the respondent on August 31, 1993. On that date claimant, a crude oil transport driver, fell from the cab of his truck to the pavement driving the left femur through the hip and shattering the socket. Due to the nature of the injury, claimant was treated conservatively and underwent extensive physical therapy and rehabilitation until he was finally released from treatment in December 1994.

At the regular hearing claimant testified that he could stand only two hours before he experienced sharp pain and must sit down. He also testified he can only sit for 30 to 60 minutes before he experienced pain, and the pain awakens him at night. In February 1995 claimant rode 175 miles in a transport truck and experienced such severe hip pain that he concluded he could not return to truck driving. When asked by his attorney, claimant testified he knew of no job tasks he could now perform. Although he had made efforts to find work, at the time of regular hearing claimant was unemployed.

Claimant's treating physician, board-certified orthopedic surgeon Joe B. Jarman, Jr., M.D., of Enid, Oklahoma, testified he believed claimant's severe complaints of pain were genuine and, therefore, claimant was totally disabled from returning to work as an oil transport driver. However, on cross-examination the doctor testified there were some tasks of a truck driver that claimant retained the ability to perform. When specifically asked whether claimant could inspect the truck or complete a logbook, the doctor indicated that claimant could probably perform those duties. Dr. Jarman was not asked to give his opinion regarding how many job tasks claimant could no longer perform due to the work-related injuries.

Because it is time consuming, Dr. Jarman avoids prescribing permanent work restrictions and limitations to his patients. He ordinarily advises his patients to listen to their bodies and do as much as they can without overdoing it.

Respondent presented the testimony of board-certified orthopedic surgeon C. Reiff Brown, M.D., of Great Bend, Kansas, who evaluated claimant at respondent's attorney's request in June 1995. Although Dr. Brown acknowledges that claimant has certain symptoms that prevent him from returning to work as a truck driver, the doctor cannot explain those symptoms on a medical basis and cannot find any medical reason why claimant cannot return to his previous work. As indicated in his medical report of June 8, 1995, Dr. Brown summarized his opinion of claimant's condition as follows:

"In my opinion, this man sustained a comminuted fracture of the acetabulum and pelvis when he fell out of his truck on August 31, 1994 [sic]. This has now completely healed and exhibits residual loss of range of motion, weakness and the radiographic appearance is excellent with well maintained joint space and no evidence of gross incongruity of the joint. His complaints of pain are greater than would be expected with radiographic appearance and I am unable to explain them. Based on loss of range of motion, the Guides to the Evaluation of Permanent Impairment, Third Revised Addition [sic], allows a 24% impairment of the left leg which converts to 10% whole body impairment. In my opinion, there is a 15% impairment of the leg as a result of weakness converting to 6% whole body impairment. These combine to 16% permanent partial impairment of function of the body as a whole on the basis of residuals of this injury. There is a possibility that a total joint replacement will be necessary here, however, there certainly is no joint incongruity, gross structural change in the joint that would cause me to say that this operation will be necessary with reasonable medical certainty. For practical purposes I believe that he is at a point of maximum medical benefit. It is noted by the records that I relieved [sic] that the range of motion tests that I have done today measure almost identically to range of motion determinations done in Dr. Jarman's office in April of 1995. In my opinion, no permanent work restrictions are medically necessary. This man can safely perform any type of work activity that is tolerable. I would anticipate that with time and effort this man could become accustomed to the vibration and prolonged sitting necessary and would be able to return to his usual work as a truck driver. If there are questions regarding this evaluation please be in touch with me."

Because his is an "unscheduled" injury, the determination of permanent partial general disability benefits is governed by K.S.A. 44-510e which provides in part:

"The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, ***in the opinion of the physician***, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between

the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury."
(Emphasis added.)

Claimant has the burden of proof to establish both the task loss and difference in earnings contemplated by K.S.A. 44-510e. Claimant did not request permanent total disability benefits but, instead, requested that he be awarded a 100 percent permanent partial general disability. Although there is no question claimant sustained a painful, serious injury, other than Dr. Jarman's general statement that claimant could not return to work as a truck driver, the record fails to establish what former work tasks claimant could no longer perform. Under K.S.A. 44-510e, the measure of permanent partial general disability benefits is not whether a worker is able to return to a former job or occupation but, instead, what effect the injury has had upon the ability to perform the specific work tasks which the worker performed in any substantial and gainful employment over the 15-year period preceding the date of accident. When considering the entire evidentiary record, claimant has failed to prove the extent of task loss. Therefore, for purposes of computing permanent partial general disability benefits, claimant's task loss should be treated as 0 percent.

Pursuant to K.S.A. 44-510e, the percentage of task loss must be averaged with the percentage of difference between pre- and post-injury earnings. Because claimant is not working, there is a 100 percent difference in claimant's earnings. Averaging the 0 percent and the 100 percent results in a 50 percent permanent partial general disability which is greater than claimant's whole body functional impairment and for which claimant is entitled to receive benefits.

The Appeals Board adopts the findings and conclusions of the Assistant Director to the extent they are not inconsistent with the above.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award dated December 6, 1995, entered by Assistant Director David A. Shufelt should be, and is hereby, modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Donald E. Nielson, and against the respondent, Plains Liquids Transport, Inc., and its insurance carrier, Commercial Union Insurance Co., for an accidental injury which occurred August 31, 1993, and based upon an average weekly wage of \$662.50 for 69 weeks of temporary total disability compensation at the rate of \$313 per week or \$21,597, followed by 180.5 weeks of permanent partial disability compensation at the rate of \$313 per week or \$56,496.50, for a 50% permanent partial general disability, making a total award of \$78,093.50.

As of February 14, 1997, there are 69 weeks of temporary total disability compensation and 111.43 weeks of permanent partial disability compensation due and owing claimant, or 180.43 weeks at \$313 per week for a sum of \$56,474.59, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$21,618.91 is to be paid for 69.07 weeks at the rate of \$313 per week, until fully paid or further order of the Director.

The remaining orders entered by the Assistant Director are hereby adopted by the Appeals Board as its own to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of February 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Eldon L. Meigs, Pratt, KS
Kendall R. Cunningham, Wichita, KS
Office of Administrative Law Judge, Salina, KS
Philip S. Harness, Director